Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-500

Appeal P-9300023

Ministry of Community and Social Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information concerning various proposals received by the Ministry concerning its Child Care Conversion Project. In particular, the requester sought access to a copy of, or certain relevant extracts from, the proposal submitted by the company (the affected party) that was awarded the contract to evaluate selected Child Care facilities in Ontario for conversion from profit to non-profit status. The Ministry located the records responsive to the request and granted partial access. Access was denied to the proposal of the affected party pursuant to sections 17(1)(a), (b), and (c) of the Act. The requester appealed the decision.

Mediation was not possible and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the appellant, and the affected party. Representations were received from the appellant and the affected party only.

PRELIMINARY ISSUES:

In its representations, the appellant claims that section 13(2)(c) of the Act applies to the record. This section is an exception to the discretionary exemption in section 13(1). The Ministry has **not** applied section 13(1) of the Act to the record at issue.

In my view, the appellant's argument that the section 13(2) exception should apply to mandate disclosure of the record, is analogous to the situation in which, an affected party, for example, claims that a discretionary exemption not claimed by an institution should apply to preclude access to a record.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered the issue of whether or not a party other than an institution can rely on a discretionary exemption when an institution has not done so. At pages 5 and 6 of that order, he stated as follows:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of an appeal.

> This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application off an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

In my view, in the circumstances, this appeal is not one of those "rare occasions" when an exemption, other than a mandatory exemption, not raised by the Ministry should be considered. This is especially the case where, as here, the appellant is raising an **exception** to a discretionary exemption.

ISSUES:

The only remaining issue in this appeal is whether the mandatory exemption provided by sections 17(1)(a), (b) or (c) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

Sections 17(1)(a), (b), and (c) read as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In Order 36, former Commissioner Sidney B. Linden enunciated a test for determining whether the section 17(1) exemption applies to a particular record. For a record to qualify for exemption

under section 17(1)(a), (b), or (c), the Ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

Part One

In order to meet part one of the test, the affected party and/or the Ministry must establish that disclosure of the records would reveal information that is a trade secret or scientific, technical commercial, financial, or labour relations information.

The appellant's position is that the record relates to issues of business valuation, a body of knowledge that is widely understood within the profession. Accordingly, it maintains that it does not believe that the record would "divulge any proprietary theory or information".

In its representations, the affected party claims that the record contains information which constitutes a trade secret. It goes on to state that:

> ... On review of the project outline, it became evident that in order to be successful in obtaining this contract, the successful bidder would have to present an innovative approach to both the valuation and in the manner in which it was carried out. A significant amount of time would have to be, and indeed was, invested in a methodology which would meet the needs of MCSS [the Ministry] in an efficient, cost-effective and fair manner.
> ...
>
> We believe that we were successful in obtaining this contract by developing a model and innovative methodology and approach in carrying out the valuations. The methodology and approach developed by our firm is not available by reference to instructional manuals or textbooks and is the culmination of the collective experience of our firm.
> ...

> ... Our methodology and approach is unique and we believe that none of the other bidders had developed a similar approach.

In Order M-29, Commissioner Tom Wright considered the various definitions of "trade secret" contained in dictionaries, Canadian and United States legislation and court cases, reports etc., and adopted the following definition, proposed by the Institute of Law Research and Reform, Edmonton, Alberta and a Federal-Provincial Working Party, in Trade Secrets (Report No. 46, July 1986):

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I note that the above definition focuses on information involving the productive process itself, rather than on other types of confidential business information such as pricing and sales volume data, which would be more properly considered under the category of "commercial" information.

Pages 1-25 of the record consist of the details of the successful proposal submitted by the affected party. The proposal describes the necessary features of the valuation process, the important issues to be considered, and a methodology to address these issues. It details the three components of its valuation process.

The information in these pages of the record may be considered to be a "method"- it clearly describes the manner in which the affected party has proposed to assess the value of the child care centres for the Ministry's project. This method is contained in the product, which is the provision of business valuation services by the affected party.

While issues of business valuation generally may be widely known within the profession, as the appellant suggests, it is my view that the specific method developed by the affected party to analyze and determine the financial value of the child care centres is unique to them. As such, it has economic value; at a minimum, it formed a part of the proposal and presentation that earned the affected party the contract with the Ministry.

In my opinion, this information was also the "subject of efforts which are reasonable under the circumstances to maintain its secrecy." The affected party believed that the proposal would be subject to the non-disclosure terms as set out in the Ministry document "Request for Proposal" (RFP). This document set out the parameters of the project and established the guidelines for the content and submission of the proposals. Throughout the course of this appeal, the affected party has continuously maintained that the record should not be disclosed to the appellant. Moreover, the affected party did not wish to have anyone other than its own employees and two expert consultants it had retained involved in the implementation of the contract.

In summary, I find that the affected party has established that disclosure of the information contained in pages 1-25 of the proposal would "reveal" information that is a "trade secret" for the purpose of section 17(1) of the Act. Accordingly, the first part of the section 17(1) test is satisfied with respect to these pages of the record.

Pages 26-29 of the record at issue consist of the "curriculum vitae" of those employees to participate in the Ministry's Child Care Conversion Project and the professional references provided to the Ministry by the affected party.

I find that the "curriculum vitae" of those persons involved in the Ministry's Child Care Conversion Project found on pages 26-28 inclusive, and the professional references found on page 29, do not qualify as a trade secret or scientific, technical, commercial, financial, or labour relations information. No other mandatory exemptions apply to these pages. Accordingly, they should be disclosed to the appellant.

Part Two

In order to meet part two of the test, the affected party and/or the Ministry must establish that the information was **supplied** to the Ministry **in confidence**.

The affected party's position on this issue is stated in its representations as follows:

> ... we direct your attention to the Request for Proposal [RFP]. Paragraph 1.5.9 "subject to the provisions of the Freedom of Information Act and the Protection of Privacy Act, 1987, MCSS will consider all bidder responses as confidential. Similarly, any materials provided by MCSS is to be considered as confidential and are to be returned to MCSS by the bidder within 10 days of the announcement of the award. Any copies are to be destroyed".

The appellant has raised the application of section 13(2) of the Act in the context of this part of the section 17 test. As I have noted in the Preliminary Issue, I need not consider this argument. The appellant also maintains that sections 5.1.2 and 5.1.3 of the RFP clearly state that the Ministry controls the distribution of the valuation reports.

In my opinion, the Ministry's RFP explicitly provides that all bidder responses supplied to the Ministry during the course of the tendering process are to be considered confidential. These include the record at issue. The RFP sections referred to by the appellant apply to the reports to be prepared by the successful bidder in the course of carrying out its contract. In view of the fact that there is an explicit confidentiality clause in the RPF which applies to the record at issue, I am not prepared to speculate on whether some of the information contained in the proposal would also appear in the valuation reports.

Accordingly, I find that the second part of the section 17(1) test has been satisfied.

Part Three

In order to satisfy part three of the test, the affected party and/or the Ministry must demonstrate that disclosure of the information at issue could reasonably be expected to result in one of the harms specified in (a), (b), or (c) of section 17(1). Detailed and sufficient evidence setting out the facts and circumstances that could lead to a reasonable expectation that harm could occur if the information at issue was disclosed is necessary to satisfy the "harms" test (Order P-246).

The affected party has provided the following representations on this issue:

> ... we believe that the release of this information will cause significant harm to our firm. We believe that similar contracts of this nature may be available in the future from many sources. The release of our methodology which was successful in this contract would put us at a disadvantage vis-a-vis our competition, particularly large multi-national consulting firms. The only thing we have which levels the playing field is our expertise which is embodied in the methodology and approach devised by us.

The appellant's position is that:

> In that the subject valuation project is absolutely unique, it is unreasonable to expect that a similar assignment will ever emerge in the future. Therefore, even if the [affected party] proposal contained proprietary information there is no way that such information could, at any future time, be used to the detriment of [the affected party].

I have carefully reviewed the representations of the parties and the records at issue and, I accept the affected party's representations that disclosure of the information contained in the record could reasonably be expected to prejudice significantly its competitive position as required by section 17(1)(a) of the Act. Therefore, in my view, the third part of the section 17(1) test has been satisfied with respect to pages 1-25 of the record.

ORDER:

1. I uphold the Ministry's decision to deny the appellant access to pages 1-25 of the record.

2. I order the Ministry to disclose pages 26-29 of the record to the appellant within 35 days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with Provision 2 of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant, **only** upon request.

Original signed by: July 16, 1993
Anita Fineberg
Inquiry Officer